IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 6TH DECEMBER 2007 / 15TH AGRAHAYANA 1929

WP(C).No. 4330 of 2006(M)

OS.384/2003 of III ADDL.SUB COURT, KOZHIKODE

PETITIONERS:

1. **M.C.SARADA, D/O.CHANDUKUTTY, RESIDING AT KULANGARA HOUSE, IDIMUZHIKKAL AMSOM, DESOM, THIRURANGADI TALUK, MALAPPURAM DISTRICT.**
2. **M.C.KOMALAM, D/O.CHANDUKUTTY, RESIDING AT THEKKUVEEDU PARAMBU, WEST HILL, KACHERI AMSOM, DESOM, KOZHIKODE TALUK.**
3. **M.C.SUNANDA, D/O.CHANDUKUTTY, RESIDING NANGELIKANDY HOUSE, BALUSSERY AMSOM, DESOM, KOYILANDI TALUK.**

BY ADV. SRI.V.V.SURENDRAN
SRI.P.A.HARISH

RESPONDENTS:

1. **M.C.MOHANAN, S/O.CHANDUKUTTY, RESIDING AT MANAYANGATTUCHALIL HOUSE, P.O.THIRUVAMBADI, THIRUVAMBADI AMSOM, DESOM, KOZHIKODE DISTRICT.**
2. **M.C.NARAYANI, W/O.CHANDUKUTTY, RESIDING AT MANAYANGATTUCHALIL HOUSE, P.O.THIRUVAMBADI, THIRUVAMBADI AMSOM DESOM, KOZHIKODE TALUK.**
3. **M.SUNESH, S/O.MOHANAN, RESIDING AT MANAYANGATTUCHALIL HOUSE, P.O.THIRUVAMBADI, THIRUVAMBADI AMSOM, DESOM, KOZHIKODE TALUK.**

BY ADV. SRI.P.T.MOHANKUMAR -- R1 TO R3

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06/12/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 4330/2006 M

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE PLAINT IN OS NO. 384/04 OF THE 3RD ADDL. SUB COURT, KOZHIKODE DT. 27/10/2003.

EXT.P2. COPY OF THE WRITTEN STATEMENT FILED BY THE RESPONDENTS 1 AND 2 DT. 27/1/04.

EXT.P3. COPY OF THE WRITTEN STATEMENT FILED BY THE R3 DT. 23/3/2005.

EXT.P4. COPY OF THE ISSUES FRAMED BY THE COURT DT. 25/2/2004.

EXT.P5. COPY OF THE ORDER DT. 09/01/2006.

RESPONDENT'S EXHIBITS **NIL.**

True copy

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PIUS C. KURIAKOSE, J.

W.P.(C) NO. 4330 of 2006

Dated this the 6th day of December , 2007

JUDGMENT

The plaintiffs in a suit for partition have filed this writ petition under Article 227 of the Constitution impugning Ext.P5 order of the trial court directing to amend the plaint by incorporating two reliefs mentioned in the order, which will necessitate valuation of the suit under Section 37 (1) of the Kerala Court Fees and Suit Valuation Act. Ext.P1 is a copy of the plaint and Exts.P2 and P3 are copies of the written statements filed by the defendants in this case. It is not contended either in Ext.P2 or in Ext.P3 that the valuation of the suit is not proper and that the court fee paid is insufficient. Naturally no issues were raised by the court regarding the propriety of valuation or sufficiency of court fees. Ext.P4 is a copy of the four issues raised by the parties who went to trial on those issues. Since the prominent defence raised through the written statement was one based on Will, the onus of proof is on the defendants to establish the Will and therefore the first defendant mounted the witness box to give evidence as the first witness on the side of the defence. Since the

examination could not be completed on one day, the case was adjourned to the next day for further examination of that witness. It is submitted that, at that stage the learned Special Judge passed Ext.P5 impugned order without bringing the aspect of propriety of valuation and sufficiency of court fees to the notice of the petitioners/ plaintiffs and without hearing the petitioners /plaintiffs on the same.

2. Impugning Ext.P5 on various grounds, the petitioner prays Ext.P5 be quashed and trial be directed to continue on the basis of the available pleadings and Ext.P4 issues already formulated.

3. Heard Sri.P.A. Harish, the learned counsel for the petitioners. He would submit that the judgment of this court in **Cherooty v. Purushothaman (2005 (2) KlT 84),** relied on by the learned Subordinate Judge in Ext.P5, was not applicable to the facts obtained in this case. Cherooty's case(supra) was one where it had been contended by the contesting parties that the valuation was not proper and that court fee was not sufficient. But, in this case, the propriety of valuation and sufficiency of court fees had never been questioned. Therefore it was not at all proper on the part of the court below to pass Ext.P5 in the absence of an issue regarding the valuation of court fees. I find merit in the submissions of the learned counsel. It is trite by various decisions of this court that the plaintiff has to be

allowed certain amount of latitude in the matter of valuing his suit and in determining as to what is the court fee payable. The avements in the plaint have to be accepted prima facie while deciding the question of valuation and court fee. As far as this case is concerned, there is no averment in the plaint (Ext.P1) to the effect that the plaintiffs are out of possession regarding the 8½ cents of property referred to in Ext.P5 order. On the contrary, it is asserted in the plaint that the petitioners are in joint possession of those 8½ cents also. Partibility of the item in question was disputed on the basis of a Will . It is conceded that it had not been for the Will the properties would have been partible. Passage of Ext.P5 order by the learned Subordinate Judge and that too in the absence of any contest regarding the correctnesses of the valuation was totally unwarranted. I set aside Ext.P5 and direct the learned Subordinate Judge to continue with the trial of the suit on the issues already formulated.

The writ petition is allowed to the above extent.

PIUS C. KURIAKOSE,
JUDGE.

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